88-844

No._____

Supreme Court, U.S.
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IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1988

WILLARD G. CHRISMAN
Appellant

v.

THE TIMES MIRROR COMPANY
Appellee

**On Appeal From The Judgment of the Court of Appeal of California Fourth Appellate District Division One**

# JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED BY THE APPEAL

**A.**

Did the Supreme Court of California err in upholding the constitutionality of the California retraction statute by affirming the Appellate Court's determination to apply it to bar plaintiff's libel claims because he did not seek a retraction within 20 days after knowledge of the publications, where plaintiff was entitled to the protection afforded by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 501, et seq., and was therefore entitled to have all statutes of limitation tolled during the period of his military service?

**B.**

Did the Supreme Court of California err in upholding the constitutionality of the California retraction statute, Civil Code section 48a, which limits a plaintiff to special damages, where the accusations made against plaintiff and printed in the

article were not "hot news," where there was clear and convincing evidence of actual malice, that is defendant's reckless disregard for the truth, where defendant did not offer evidence to contest plaintiff's status as a private figure, and where the accusations were libelous on their face?

C.

Where there was clear and convincing evidence that the defendant republished false accusations first made by Navy personnel in its newspapers with actual malice, and plaintiff proved that the defendant's publications injured plaintiff's personal and professional reputation, did the Supreme Court of California err in upholding the Appellate Court order granting defendant's motion for summary judgment on the grounds that as a matter of law the Navy and not defendant caused plaintiff's injury?

D.

Where defendant's newspaper articles

reporting on plaintiff's court martial trial were neither true nor fair because the testimony was incorrectly or falsely summarized and because substantially all exculpatory testimony and evidence was excluded, did the California Supreme Court unconstitutionally extend the scope of the "neutral reportage" privilege, and literary license doctrine, and misapply Civil Code section 47(4) so as to deprive plaintiff of the right to protect his reputation from defamatory statements.

## CITATIONS TO OPINIONS

The Opinion of the Supreme Court of the State of California denying Willard G. Chrisman's Petition for Review on July 28, 1988, affirming the Order of the Court of Appeal, fourth Appellate District, Division One, appears in the Appendix. It is not reported.

The Opinions of the Court of Appeal, Fourth Appellate District, Division One Court also appear in the Appendix. Neither has been officially reported.

## LIST OF ALL PARTIES

The parties to the proceeding in the Supreme Court of California were as follows:

Appellant: Willard G. Chrisman

Appellee: The Times Mirror Company

(publishers of the L.A. Times)

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**STATEMENT OF JURISDICTIONAL GROUNDS**

1. On May 17, 1985, WILLARD G. CHRISMAN (hereafter "CHRISMAN") filed a libel suit in the Superior Court of the County of San Diego, State of California, against the Times Mirror Company, publishers of the LOS ANGELES TIMES (hereafter "L.A. TIMES"). He claimed that by publishing an article on May 20, 1984 in which the L.A. TIMES republished, without investigation, allegations that while drunk he caused his ship, the USS THOMASTON, to go aground in Hawaii, and by republishing these allegations in an article dated August 29, 1984, and by publishing five articles in October of 1984 during his court-martial trial in which it republished the same false accusations and unfairly described the trial testimony, the L.A. TIMES caused him injury, including personal injury and injury to his reputation and Naval career. (Copies of these articles and an article dated June 22, 1984 are

included in the Appendix.)

On June 26, 1987, the trial court denied the L.A. TIMES' motion for summary judgment. On September 27, 1987, the California Court of Appeal, Fourth District, Division One (hereafteer "Appellate Court") denied the L.A. TIMES' Petition for Writ of Mandate seeking to compel the trial court to grant its motion for summary judgment.

On November 12, 1987, the California Supreme Court granted the L.A. TIMES' Petition for Review and directed the Appellate Court to hear the matter.

In its opinion, filed May 9, 1988, the Appellate Court granted the L.A. TIMES' Petition for a Writ of Mandate; it reversed the order of the San Diego Superior Court denying the L.A. TIMES' Motion for summary judgment. The Appellate Court held that, as a matter of law, the retraction statute, California Civil Code section 48a was applicable, and that it was the Navy that

was the legal cause of plaintiff's special damages; thus, it granted summary judgment as to the May 20, 1984 article. Applying California Civil Code section 47(4), and the literary license doctrine, it concluded that the articles on the court-martial were true and fair as a matter of law and granted summary judgment as to them.

2. On July 28, 1988, the Supreme Court of California denied plaintiff's petition for review of the Appellate Court's May 9, 1988 opinion, thereby upholding the validity of the challenged statutes, Civil Code section 48a, and Civil Code section 47(4), and rejecting plaintiff's claim that the Soldiers' and Sailors' Civil Relief Act 50 U.S.C.A. App. § 501, et seq. applied, and that the retraction statute was unconstitutional, thereby depriving plaintiff of due process and equal protection. A copy of the Order is set forth in the Appendix.

3. Jurisdiction of this Court is con-

ferred by 28 U.S.C. § 1257(2) in that there is drawn into question the validity of a state statute (Civil Code section 48a) on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest state tribunal was in favor of the statute's validity.

4. The provisions of 28 U.S.C. § 2403(b) may be applicable and, accordingly, service of this Jurisdictional Statement has been made upon the Attorney General of the State of California.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. United States Constitution, Amendment I:

> "Congress shall make no law... abridging the freedom of speech, or of the press. . .."

2. United States Constitution, Amendment XIV, § 1:

> ". . .[N]or shall any state deprive any person of life, lib-

erty, or property, without due process of law. . . ."

3. Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. App. § 501, et seq.:

"This Act [sections 501 to 591 of this Appendix] may be cited as the Soldiers' and Sailors' Civil Relief Act of 1940.

* * *

**§ 510. Purpose; suspension of enforcement of civil liabilities**

"In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of

persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act [sections 501 to 591. . .] remains in force.

* * *

**§ 525. Statutes of limitations as affected by period of service**

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or pro-

ceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

3. California Civil Code section 45:

"**Libel, What.** Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

4. California Civil Code section 45a:

"**Libel on its face; other actionable defamatory language**

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special dam-

age as a proximate result thereof. Special damage is defined in Section 48a of this code."

5. California Civil Code section 47(4):

"A privileged publication or broadcast is one made--. . .

4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued."

6. California Civil Code section 48a:

"**§ 48a. Libel in newspaper; slander by radio broadcast**

1. **Special damages; notice and demand for correction.** In any action for damages for the publi-

cation of a libel in a newspaper, . . . plaintiff shall recover no more than special damages unless a correction be demanded and be not published. . ., as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication. . ., a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication. . .claimed to be libelous.

2. **General, special and exemplary damages.** If a correction be demanded within said period and be not published. . .in substantially as conspicuous a manner in said newspaper. . .as were the statements

claimed to be libelous, in a regular issue thereof published . . .within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication... with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication. . ..

3. **Correction prior to demand.** A correction published. . .in substantially as conspicuous a manner in said newspaper. . .as the statements claimed in the

complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published. . .within three weeks after a demand therefor.

4. **Definitions.** As used herein, the terms 'general damages,' 'special damages' and 'actual malice,' are defined as follows:

(a) 'General damages' are damages for loss of reputation, shame, mortification and hurt feelings;

(b) 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has ex-

pended as a result of the alleged libel, and no other;

(c) 'Exemplary damages' are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication. . .with actual malice;

(d) 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication. . .at the time it is published. . .shall not constitute actual malice."

## STATEMENT OF THE CASE

### A. Procedural History

This action for libel under the laws of California was instituted in May, 1985 in the Superior Court of California for the County of San Diego. Plaintiff was a Navy Officer who had commanded the USS THOMASTON before the publication by the L.A. TIMES in May, 1984 of an article alleging that he was drunk and caused his ship to go aground. He alleged that the seven articles published by the L.A. TIMES, including five about his court-martial, were defamatory and that they ruined his Naval career and reputation as well as causing him distress and general damages. (A copy of these articles is a part of the Appendix.)

On July 25, 1986, the L.A. TIMES filed its Motion for Summary Judgment, relying on California Civil Code sections 48(a), the retraction statute, and section 47(4), the "fair reporting" privilege. It designated

as the legal issues to be decided, inter alia:

1) Whether or not because plaintiff had not made a correction demand as to the first three of the seven articles within 20 days of knowledge of said publication, he was limited to "special damages," and that plaintiff could not prove that the L.A. TIMES caused him to suffer "special damages"; and

2) Whether its reports on the court-martial were absolutely privileged pursuant to California Civil Code section 47(4), and the United States and California Constitutions.

CHRISMAN filed his response on October 20, 1986.[1/]

On March 13, 1987, plaintiff filed his Supplemental Opposition to the Motion for Summary Judgment.[2/]

On April 9, the Court heard argument and took the matter under advisement, advising the parties they could file

supplemental material.

On May 26, 1987, CHRISMAN filed a Supplemental Memorandum.[3/]

On June 5, 1987 and June 25, 1987, the Superior Court denied the defendant's Motion for Summary Judgment. (A copy of its orders are contained in the Appendix.)

On July 14, 1987, the L.A. TIMES filed a Petition for Peremptory Writs, which was denied by the Fourth District Court of Appeal on September 22, 1987. (A copy of this order is contained in the Appendix.)

On November 12, 1987, the California Supreme Court granted the L.A. TIMES' Petition for Review and directed the Fourth Distrct Appellate Court to hear the matter. (A copy of the order is contained in the Appendix.)

On May 9, 1988, the Appellate Court granted the L.A. TIMES' Petition for Writ of Mandate.

Plaintiff appealed to the California Supreme Court, asserting that the Fourth

District Court of Appeal was in error; that the invocation of the retraction statute, when plaintiff was clearly entitled to the protection of the Soldiers' and Sailors Relief Act, was unconstitutional; and that the invocation of the fair reporting privilege likewise was in error and unconstitutional. The California Supreme Court denied plaintiff's Petition for Review on July 28, 1988.

B. **Facts**

On May 20, 1984, the L.A. TIMES published the first of eight defamatory articles with the headline "Navy Officers Say Drunk Captain Caused Grounding." Without investigating the veracity of its "not for attribution" sources[4/], in the face of an interview with a civilian who confirmed CHRISMAN was not intoxicated and knowing of his distinguished service record, the L.A. TIMES asserted that CHRISMAN was intoxicated on January 24, 1984 and caused the USS THOMASTON to be grounded; thereafter he

caused the USS THOMASTON to leave Hawaii knowing it was damaged; because of the damage seawater filled the ship causing a landing craft (LCU) to "break loose," causing "flooding and chaos" and further damage; he had "covered-up" the cause of the incidents. At the time the first article was published, CHRISMAN was in command of the USS THOMASTON stationed in Japan; had been recommended for promotion, and ordered to attend the Navy War College.[5/]

After the publication of the initial article, CHRISMAN was relieved from command of the USS THOMASTON on June 11, 1984. His superiors advised him he was removed in response to the article. The Navy investigation was reopened.

On June 22, 1984, the L.A. TIMES wrote and published: "the Navy reopened its investigation after the L.A. TIMES published the officers' allegations in a story on May 20, 1984." It also acknowledged the ad-

verse affect this would have on his career. "If he is exonerated. . .it is unlikely he would return to the Thomaston, which he has commanded since 1982."

On July 2, 1984, the Navy on the basis of sworn testimony of Navy personnel on board the ship on January 24, 1984 found "no probable cause" to believe CHRISMAN committed any alleged offenses, including that he was intoxicated. Nevertheless, on August 23, 1984, court-martial proceedings were ordered. The court-martial trial commenced in October, 1984, in San Diego.[6/]

The L.A. TIMES published five articles reporting on the court-martial trial, reiterating their initial allegations that CHRISMAN was drunk and had participated in a cover-up. The articles were neither "true" nor "fair." Examples of the distortions of the trial testimony are as follows:

In the first article, the L.A TIMES stated:

Prosecutors...began their case...by

presenting seven officers and crew members who testified that CHRISMAN exhibited various signs of intoxication before and after the January 24 grounding. (Emphasis added.)

Seven officers and crew members did not testify that "CHRISMAN exhibited various signs of intoxication before and after the January 24th grounding." Rather, ten witnesses testified on the first day of trial: Lt. Morison, Lt. Gannon, Dr. Straube, Mr. Moats, Lt. Kilgore, Lcdr. McCannel, Fireman Medina, Seaman Meeuwes, Lt. Fuzy, and Lt. Lewis. Two witnesses, Mr. Moats and Dr. Straube, were civilians. Fireman Medina and Seaman Meeuwes did testify that CHRISMAN appeared hung-over or dehydrated the next day, but admitted they did not see him on the previous evening. Lieutenant Morrison stated he did not see CHRISMAN on January 24. Lieutenant Gannon stated CHRISMAN walked differently than normal, but there was no smell of alcohol. Lieutenant Kilgore stated CHRISMAN "came aboard rather slowly, his steps were very

heavy, he seemed to be using the brow for a great deal of support." Lieutenant Commander McCannel stated CHRISMAN "looked a little drawn, a little pale, speech was slow, looked a little unsteady, leaned up against a bulkhead" at the time he came on the ship, but that "CHRISMAN arrived on the bridge five minutes before the ship got under way, was two or three feet away from him, he appeared normal and looked better than earlier in the evening." Lieutenant Fuzy stated he "saw CHRISMAN when he woke up and he looked a little disoriented as he had just got up." Lieutenant Lewis was the last officer to testify, he said he "attempted to wake CHRISMAN by calling his name, that he did not see anything abnormal about CHRISMAN when he left his sea cabin." A civilian, Mr. Moats, testified that "he observed CHRISMAN "drinking a couple of beers during the day" and that "CHRISMAN was "not under the influence of alcohol."

In sum, of the ten persons who

testified for the prosecution, one stated he did not see Cmdr. CHRISMAN on the bridge, two stated he "appeared normal," one said he was "not under the influence," two stated he "appeared hung-over or dehydrated the next day," and none stated he thought, believed, or knew CHRISMAN was "intoxicated" or "exhibited various signs of intoxication" before the incident. These witnesses' testimony fairly and accurately could have been and should have been reported as supporting CHRISMAN's defense of illness and food poisoning.

The October 3, 1984 L.A. TIMES' article also stated:

> . . .despite their efforts to wake him, CHRISMAN usually a light sleeper, failed to stir, officers testified. (Emphasis added)

Only two officers testified on October 2, 1984, about CHRISMAN sleeping before going to the bridge. Lieutenant Lewis stated: he "attempted to wake CHRISMAN by calling his name and that he previously had no difficulty in waking him and that he did

not see anything abnormal about CHRISMAN when he left his sea cabin." Lieutenant Fuzy testified: he "saw CHRISMAN when he woke up and that he looked a little disoriented as he had just got up." Accordingly, no officers stated "despite their efforts to wake him, CHRISMAN usually a light sleeper, failed to stir." The L.A. TIMES reporting was clearly intended to convey a false impression that CHRISMAN was unable to attend to his duties, an impression inconsistent with the testimony of the witnesses.

On October 4, 1984, the L.A. TIMES' article entitled: "BOSUN SAYS CHRISMAN TOLD HIM TO SHUT-UP ABOUT SHIP GROUNDING" included the following paragraph:

> Several days after his ship went aground in Hawaii, Captain Willard (Bud) Chrisman admonished a crewman to shut-up and "not spread around" word of the accident. Chief Petty Officer Heersema's sworn statement bolstered the Navy's assertion that CHRISMAN, accused of being drunk when the grounding occurred January 24, 1984, attempted to hide from his superiors the true circumstances surrounding the incident.

Heersema had testified: "he told me to tell the truth" about the grounding. This testimony was not reported. Rather, his testimony, which did not mention Parkhurst [CHRISMAN's superior] and was elicited on cross-examination, was reported out of context and edited so as to convey to the reader the false impression that Heersema didn't speak to Parkhurst because CHRISMAN told him not to.

The October 4, 1984 TIMES' article also stated:

> Officers testified that CHRISMAN assured them after the grounding that his friend, a fellow officer, was to investigate the incident and that no one was going to be found culpable. (Emphasis added).

This suggested that there was testimony from which an average person would infer an agreement between Parkhurst and CHRISMAN that the investigation would be a whitewash. No testimony supported the TIMES' accusation and choice of the use of the verb "assured" and the word "culpable." Only two officers testified that CHRISMAN

had spoken to them concerning Captain Parkhurst's investigation: Lt. Kurzawa, who testified that CHRISMAN said "Captain Parkhurst would conduct a fair investigation"; and LtJG O'Neil, who testified "CHRISMAN informed the Chiefs and Officers no one had anything to worry about concerning the Parkhurst investigation implying that things might be smoothed over," and also that "CHRISMAN told them to speak freely and hold nothing back."

The October 4, 1984 TIMES' article goes on to state:

> . . .Coulapides questioned CHRISMAN's tactics on the night of the grounding: Coulapides, who has spent 39 years in the Navy, said that, in many ways, CHRISMAN's actions weren't those of a "reasonable and prudent" skipper. . .." (emphasis added)

This is an untrue and unfair summary of Coulapides' testimony as he never used the phrase "in many ways Chrisman's tactics weren't those of a reasonable and prudent skipper," and, in fact, did not disagree with several of his tactics.

Moreover, the October 4 article did not report the testimony of the civilian harbor pilot, Captain Geronimo, who was on board the evening of January 24, 1984 to guide the ship from the harbor. Geronimo testified "CHRISMAN was not intoxicated," and that CHRISMAN handled the ship correctly. By consciously deleting any reference to Captain Geronimo and failing to summarize his testimony, the TIMES conveyed an unfair summary of the gist of the October 3 testimony of the experts.

Nor did the TIMES report on October 4, 1984, the exculpatory testimony of Lt. Perine and Lt. Smith, who both testified CHRISMAN "was not intoxicated/acted normal" and did not attempt to cover-up the incident by telling them Parkhurst was a friend, again conveying an erroneous impression as to the strength of the Navy's case.

The L.A. TIMES printed an article on October 5, 1984 entitled: "DRAMA LOW KEYED

AT COURT-MARTIAL." Freed wrote a "feature story" rather than an article presenting an accurate account of CHRISMAN's defense. The testimony, which was not reported, included a civilian, Mr. Ken McKnight, who testified he was "with CHRISMAN all day, CHRISMAN was not under the influence of alcohol, and he too became ill after the fish dinner"; Petty Officer Reese, who was next to CHRISMAN on the bridge, who testified CHRISMAN was "not intoxicated"; Petty Officer Stephens, who was on the quarter deck, who testified that he "heard rumors that CHRISMAN was drunk" but "knew it was not true because he saw CHRISMAN when he came aboard and he was not under influence"; and Petty Officer Decker, who repaired the LCU boat, and testified he "considered the damage minor."

Other exculpatory testimony which would have conveyed to a reader that CHRISMAN was not guilty of all of the charges was entirely omitted. Commander

Mottet, M.D, who testified "CHRISMAN's symptoms were more consistent with food poisoning rather than alcohol intoxication" and that "it is not abnormal for breath and vomitus to smell of beer if one had drank one beer with dinner"; Chief Pettette, who testified that "Seaman Meeweus is not honest," and that "CHRISMAN had never drank to excess"; Cdr. Hough, Commanding Officer of USS Montacello, who testified CHRISMAN had been his "professional acquaintance for several years and he had never seen or had heard of him abusing alcohol"; Captain McMannis, who testified he had "known CHRISMAN for several years and he was known as a superior athelete who never abused his body"; Captain Parkhurst, who testified he "conducted a thorough investigation" and that "CHRISMAN fully cooperated and did not attempt to hide anything"; and Captain Gimber, CHRISMAN's superior officer, who testified "CHRISMAN sent all appropriate reports on the grounding and damage in a

timely and accurate manner," and that he "never received any evidence CHRISMAN was intoxicated or attempted to hide any facts." In sum, a reader of the L.A. TIMES on October 5, 1984, by reason of the L.A. TIMES' decision to omit critical and important defense testimony, could and would have concluded that CHRISMAN was guilty, that his defense had no merit or substance, when in fact the contrary was true.

The TIMES' article of October 6, 1984, was entitled: "SKIPPER DENIES GOING AGROUND WHILE DRUNK." The text included this summary of the trial:

> Some crewmen have testified Chrisman appeared intoxicated. (Emphasis added.)

This was an unfair synopsis of the trial testimony: not one crewman had testified that CHRISMAN "appeared intoxicated" at any time during the trial. Although the Fourth District Court of Appeal, in its opinion, summarized Loessin's testimony by stating "he suspected Chrisman was drunk," in fact,

Loessin testified he "inferred CHRISMAN was intoxicated only because some of the guests of the Navy he observed were boisterous, but later determined CHRISMAN was not intoxicated."

The concluding article, published on October 7, 1984, appeared with the headline: "COMMANDER ACQUITTED OF DRUNKENESS." In the text, the TIMES again summarized the trial testimony:

> Crewmen testified that he [CHRISMAN] appeared drunk as he came aboard.

Once again, this synopsis of prior testimony was a blatant falsehood, and not an editorial oversight. A review of Freed's notes of the trial concerning the testimony of the witnesses reveals not one reference to the phrase "Chrisman appeared drunk as he came aboard." The word or phrase "not intoxicated" or "not under the influence," however, appeared six times in Freed's notes: in the testimony of Mr. Moats; Capt. Geronimo; Mr. McKnight; Petty Officer Reese; Chief Steel; and Lcdr. Loessin. The

words "appeared [or acted] normal" were written three times in Freed's notes: Lcdr. McCannel; Petty Officer Crawford; Petty Officer Stephens. In sum, Freed and the L.A. TIMES made a conscious and deliberate choice to publish only that which tended to injure plaintiff in the eyes of the public and his peers.

Additionally, the October 7 article states:

> [He] was found afterward passed out in his cabin.

No witnesses testified that CHRISMAN was found "passed out in his cabin" either before or after the incident. To choose such words was to convey to a reasonable person that CHRISMAN was so incapacitated on the evening of January 24 as to be stuporous, an impression clearly at odds with the testimony and not supported by Freed's notes of the trial.

The article also states:

> Chrisman arrived on the Thomaston as the ship backed out of the harbor. (Emphasis added)

In fact, witnesses had testified CHRISMAN arrived on the bridge five to ten minutes before the ship got underway and discussed the intended maneuvering with the civilian harbor pilot. No witnesses testified: "Chrisman attempted no other evasive actions" as the TIMES wrote, but rather Loessin and McCannel testified "Chrisman was doing everything possible to maneuver the ship out of danger." Again, the choice of words by Freed was to bolster the TIMES' view that CHRISMAN was unable to properly carry out his duties, rather than to tell the public what the testimony of McCannel, Geronimo, and others had been, which was that CHRISMAN was on the bridge before the ship got underway, conducting himself properly.

In sum, the literary license concept does not permit a newspaper to inaccurately describe events so as to "change the complexion of the affair." Since the articles were neither true nor fair, and the

omissions were such as to affect a reasonable person's understanding of the court-martial testimony, denying plaintiff a jury trial on the basis of the "fair reporting" privilege deprived plaintiff unconstitutionally of the right to seek damages for injury to his reputation. The effect of the court's decision was to create an absolute privilege for the defendant newspaper.

## REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### A. The Supreme Court of California, by Affirming the Application of the Retraction Statute, California Civil Code § 48a, when Plaintiff, Because of his Status as a Member of the Armed Services on Overseas Duty, was Unable to Retain Counsel to Protect his Legal Rights, Deprived Plaintiff of the Protection Mandated by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 501, et seq.

Congress recognized when it passed the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 501, et seq., that because of the nature of the duties imposed upon members of the armed services, legal rights could be lost because a member of the armed services could not seek counsel or act within requisite statutory time limitations, and applicable limitations should therefore be tolled during the period of a plaintiff's military service. In the present case, by approving the lower court's use of the retraction statute and requiring plaintiff to prove "special damages" because he did not request a retraction within 20 days after knowledge

of publication of the articles, thereby limiting his libel claims, the Supreme Court of California ignored the mandate of Congress. In doing so, it not only deprived plaintiff of the opportunity to present his libel claims relating to the initial and three subsequent articles published by the L.A. TIMES, but also of the protection of the Soldiers' and Sailors' Civil Relief Act.

**B. The California Retraction Statute, Civil Code § 48a, Because It Does Not Purport to Exclude From Its Protective Mantle a Newspaper that acts with Actual Malice, is Unconstitutional as Violative of the Fourteenth Amendment.**

California Civil Code section 48a does not purport to exclude from its protective mantle a newspaper that acts with "actual malice." If no retraction demand is made, it limits a plaintiff defamed by a newspaper to "special damages," whether or not there is evidence of impairment of reputation, personal humiliation, and mental anguish and suffering. In light of this

Court's ruling in New York Times v. Sullivan 376 U.S. 254 (1964) limiting those instances where First Amendment protection is afforded newspapers, and its recognition "of the strong and legitimate interest in compensating private individuals for injury to reputation" Gertz v. Robert Welch, Inc., 418 U.S. 323 at 348-349 (1974) and Philadelphia Newspapers Inc. v. Hepps, U.S. 106 S.Ct. 1558 (1986), dissenting opinion at pg. 1570, the statute impermissibly affords a newspaper greater protection than allowed by precedent and our constitutional system.[7/] For, as the court held in Gertz v. Robert Welch, Inc., 418 U.S. at 350:

> The common law of defamation is an oddity of tort law, for it allows recovery of purported compensatory damages without evidence of actual loss.

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**C. The Supreme Court of California, Denied Plaintiff Equal Protection and Due Process of Law Because (1) The Statements Published were Libelous Per Se; (2) Plaintiff Was not a Public Figure or Public Official; (3) There was Clear and Convincing Evidence that the L.A. TIMES Acted with Malice; and (4) Its Publications were not "Hot News."**

A review of the intitial three articles authored by David Freed published by the L.A. TIMES (See, Appendix) reveals the publication of false accusations which were libelous on their face, e.g., that plaintiff was "drunk"; that he cautioned his subordinates not to tell the truth during the Navy inquiry; was a "disgrace"; "endangered 310 lives by his action," when leaving Hawaii several days later permitted water to enter the vessel causing the LCU incident, and that he attempted to cover-up the latter incident. Williams v. Daily Review, Inc. (1965) 236 Cal.App.2d 405, 411; Burnett v. National Inquirer (1983) 144 Cal.App.3d 991, 1013.

Proof of damage to reputation or to one's career is not a prerequisite to

stating a cause of action for libel. Gertz v. Robert Welch, Inc., supra, 418 U.S. at pp. 348-350. Where the defamation is libel per se, general damages are presumed as a matter of law. Allard v. Church of Scientology (1976) 58 Cal.App.3d 439 at 450, cert. den. 429 U.S. 1091 (1971). As this Court noted in Time, Inc. v. Firestone 424 U.S. 448 at 460 (1976), damages for libel per se can be presumed as a matter of law upon a showing of mere fault (private person) or reckless disregard (public official or figure).

The L.A. TIMES nevertheless argued that, pursuant to section 48a, it was entitled to summary judgment as to the first three articles it published as to which no retraction demand had been made because as a matter of law, CHRISMAN could not prove that its conduct caused him "special damages." The trial court recognized that CHRISMAN had presented sufficient facts to create a jury issue as to whether the

articles caused him to suffer damage in his profession and occupation and, therefore, did not need to reach the constitutional issues. Under the circumstances of this case -- the clear and convincing evidence of actual malice and the L.A. TIMES' admission that the May 20, 1984 article was not "hot news" -- the Supreme Court of California's ruling which accepted the L.A. TIMES' argument premised upon Civil Code section 48a, raises serious constitutional issue:

(1) Section 48a was intended by the legislature to afford limited protection to those publishers who, because of time constraints, make inadvertent errors. Field Research Corp. v. Superior Court (1971) 71 Cal.2d 110, 114; Werner v. Southern California Associated Newspapers (1950) 35 Cal.2d 121, 128, appeal dismissed, 340 U.S. 910 (1951); Burnett v. National Enquirer, Inc. (1983) 144 Cal.App.3d 991, appeal dism. 465 U.S. 1014. In granting to news-

papers privileges denied to others and depriving a plaintiff defamed by a newspaper of the right enjoyed by plaintiff defamed by others, including a jury trial as to general damages, section 48a is arbitrary and unreasonable, unconstitutional and on its face violative of the the equal protection and due process clauses of the Fourteenth Amendment.

(2) By limiting CHRISMAN to "special damages" and by finding that there was no proof that defendant's conduct caused special damages, thereby denying plaintiff a trial and recovery of general damages because he did not serve retraction demands, the Supreme Court of California imposed a heavier burden on plaintiff than allowed under the United States Constitution. Where a private figure libel plaintiff is involved, the First Amendment does not require the court to "tip the scales in favor of protecting the speech merely because the speech addresses matters

of public concern." Gertz v. Robert Welch, Inc., supra, at 345-346; Time Inc. v. Firestone, supra, at 454-456; Philadelphia Newspapers, Inc. v. Hepps, ___ U.S. ___ 106 S.Ct. 1558 (1986).

(3) The L.A. TIMES did not demonstrate that plaintiff was not entitled to the status of a private figure; and plaintiff offered evidence that he was a private figure and not a public official. Hutchinson v. Proxmire, 443 U.S. 111 (1979); Manguso v. City of Oceanside (1984) 153 Cal.App.3d 574. He neither had access to nor employed the news media to counter the L.A. TIMES charges, and he did not inject himself into the limelight. Simply because he is a Naval officer does not mean he was a "public official" because he neither made policy nor exercised discretion. New York Times v. Sullivan 376 U.S. 254 (1964).

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**D. By Denying Plaintiff a Jury Trial on the Initial Articles Written About Him, The Supreme Court of California Unconstitutionally Expanded the Neutral Reportage Doctrine.**

The scope of the "neutral reportage" privilege is limited to ensure that the media is not granted absolute immunity to espouse and concur in unwarranted attacks or to concur in charged by others. Ciancini v. New Times Publishing Co., 639 F.2d 54, 69-70 (2d Cir. 1980).[8]/ The Supreme Court of California affirmed the decision of the Appellate Court that the L.A. TIMES articles were not the "legal cause" of plaintiff's injuries and "it cannot be held liable." By implication it unconstitutionally expanded the neutral reportage doctrine,[9]/ and disregarded this court's dictates in Curtis Publishing Co. v. Butts, 388 U.S. 130, at 155 (1967), that even public figures and public officials (which plaintiff was not) may recover damages for the publication of "defamatory falsehood whose substance makes substantial

damage to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

**E. Where a Comparison Between the Transcript of Judicial Proceedings and a Newspaper's Publications Reveals Editing and Deleting such that the Nature and Contents of the Proceedings are Misrepresented, is it Constitutionally Permissible to Invoke the Literary License Doctrine?**

In the present case, the L.A. TIMES stories and headlines did not capture the "gist and sting" or the "substance of the proceedings."[10]/ The L.A. TIMES, throughout its reporting on the trial, did not merely "characterize" or "summarize" the testimony, but rather edited the testimony so as to convey an erroneous impression of the strength of the government's case and the weakness of CHRISMAN's defense. Because the articles were neither true nor fair, application of Civil Code section 47(4) and a fair-reporting privilege was unconstitutional. Schiavone Construction

Co. v. Time, Inc. 735 F.2d 94 at 97-98 (2nd Cir. 1984), 619 F.Supp. 684 at 708 (D.C.N.J. 1985).[11/]

In Gertz v. Robert Welch, Inc., 418 U.S., supra, this court determined that the First Amendment does not confer an absolute privilege to defame; it held that the fact that a newspaper publication concerned a public issue did not by itself entitle a libel defendant to the constitutional protection of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Later, this court, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., __ U.S. __, 105 S.Ct. 2939 (1985), in its plurality opinion, concluded that when defamatory statements do not involve matters of public concern, "actual malice" need not be proved to recover presumed and punitive damages. Thus, this court again recognized that the First Amendment does not compel granting absolute immunity from defamatory publications. Even if the articles were matters

of "public concern," if this court were to sanction the employment of the literary license doctrine where, as here, the editorial process resulted in a gross distortion of the contents of a judicial proceeding, it would in effect confer absolute immunity upon the press.

**CONCLUSION**

The invocation by the California courts of the retraction statute and the literary license doctrine as codified in California Civil Code section 47(4) to bar plaintiff's claims that he was libeled by defendant's reports of judicial proceedings where: (1) the plaintiff was in the armed services and entitled to the protections of the Soldiers' and Sailors' Relief Act; (2) the defendant's publications were libelous per se; (3) plaintiff asserted he was a "private figure" and the defendant offered no contrary evidence; (4) the publication was not "hot news"; and (5) the plaintiff produced clear and convincing evidence of

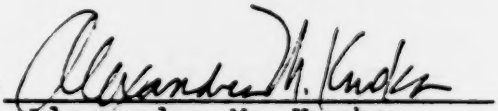
actual malice to deny plaintiff a jury trial on general and special damages, raises substantial constitutional issues, which have not been decided by this court.

The instant action presents this court with a full record and the opportunity to define a "public official" and clarify the definition of "private figure," and whether the literary license doctrine confers absolute immunity. It is appropriate for plenary consideration by this court.

Accordingly, appellant respectfully urges this court to note probable jurisdiction and grant plenary consideration of the questions presented herein with briefs on the merits and oral arguments.

Respectfully submitted,

Dated: Nov.14, 1988 **COPPO & COSGROVE**

By: 

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AMK:gvb[3.2]

## FOOTNOTES

1 Plaintiff's response included a Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment or Adjudication of Issues, Plaintiff's Statement of Disputed Material Facts, the Declaration of Willard G. Chrisman, the transcripts of the Deposition of David Freed, the author of the articles, and the court-martial transcript. He also filed the Declaration of LCDR Michael Loessin, the Executive Officer who was on the bridge of the USS THOMASTON with CHRISMAN on the evening of January 24, 1984.

2 It included a personal letter to CHRISMAN dated June 16, 1984 from his superior, in which Parkhurst wrote: "you were relieved because of a newspaper article which embarrassed the Navy. . .," as well as a summary of the deposition of Parkhurst.

3 It included his Declaration in which he advised the court that he was in Japan when the initial article was published, and explained why he had not made timely retraction demands; he referred the court to the Soldiers' and Sailors' Relief Act.

4 David Freed admitted in his deposition that the L.A. TIMES' policy was not to publish on the basis of unattributed sources, who are less credible than sources who would allow their names to be used.

5 A Navy investigation conducted by Parkhurst had concluded that the grounding was caused by several factors, including gale force wind and loss of one of the ship's two main engines, and that there was no need for punitive or disciplinary action against CHRISMAN.

6 CHRISMAN was found not guilty of all the charges regarding intoxication and a "cover-up"; he was found guilty of only a single charge of simple negligence: "negligently hazarding his vessel," a charge which standing alone, would not have resulted in a court-martial. CHRISMAN, despite his accomplishments and record, was not reassigned to command a vessel and has not been promoted.

7 As Justice Stewart wrote in his concurrence in Rosenblatt v. Baer, 383 U.S. 75, 92-94:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.

8 As the court held in Edwards v. National Audubon Society, Inc., 556 F.2d 113, 120 (2d Cir.) cert. den. 434 U.S. 1002 (1977):

> A publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage, but rather assumes responsibility for the underlying accusations.

9/ The court relied on Werner v. Hearst Publications, Inc. (1944) 65 Cal.App.2d 667 when it held that because the Navy launched its own investigation, "there was no causation and no liability."

10 As an example, prosecution witnesses on the first day were testifying that plaintiff was "not intoxicated" and

appeared normal, and that officers determined to allow water to enter the well-deck without advising CHRISMAN causing the LCU incident, but the L.A. TIMES reported otherwise.

11 As the court in Schiavone wrote, citing the Restatement (Second) of Torts:

> Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence. . ..
>
> 735 F2d at 97.